Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-126

In the

Supreme Court of the United States

OCTOBER TERM, 1980

OUTBOARD MARINE CORPORATION,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
(by William J. Scott, Attorney General),
UNITED STATES OF AMERICA,

and

MONSANTO COMPANY,

Respondents.

Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, OUTBOARD MARINE CORPORATION, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

QUESTIONS PRESENTED

1. Whether the federal common law has been displaced by enactment of a comprehensive statutory and regulatory scheme in the Clean Water Act.

2. Whether the federal common law of nuisance should be extended to a controversy which does not involve an inter-state dispute.

3. Whether a citizen is permitted to intervene as a matter of right under Section 505(b)(1)(B) of the Clean Water Act (33 U.S.C. §1365(b)(1)(B)) where the relief sought by the federal government is the removal of alleged contaminants rather than compliance with an effluent standard, limitation or order.

4. Whether the Court of Appeals properly allowed the state Attorney General to choose between maintaining a separate suit, or intervening in the pending case brought by the United States government, when the Clean Water Act provides for a right to intervene only when the statute prohibits a separate citizen's suit.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, published on March 28, 1980, is as yet unreported, and is reproduced herein as Appendix A. The order of the court denying a petition for rehearing is reproduced herein as Appendix B. The memorandum opinions and orders of the United States District Court for the Northern District of Illinois, rendered on May 29, 1979 and February 28, 1979, which were reversed by the Court of Appeals, are unpublished and appear herein as Appendices C and D.

JURISDICTION

The Court of Appeals for the Seventh Circuit issued its judgment on March 28, 1980. On April 29, 1980, the court denied petitioner's timely filed petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §§1254 and 2101(c).

STATUTORY PROVISIONS INVOLVED

33 U.S.C. §1251 *et. seq.*

33 U.S.C. §1365(b)(1)(B) provides in pertinent part:

> (b) No action may be commenced -
>
> (1) Under subsection (a) (1) of this section -
>
> (b) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in any court of the United States any citizen may intervene as a matter of right.

STATEMENT OF THE CASE

The consolidated appeals of the Illinois Attorney General to the Court of Appeals are a part of several related proceedings in the United States District Court for the Northern District of Illinois. On March 1, 1978, Outboard Marine Corporation ("OMC") filed suit against the Administrator of the United States Environmental Protection Agency ("EPA"). OMC there is claiming that the environmental agencies have failed to properly perform their responsibilities under the Clean Water Act, including with respect to Waukegan Harbor. That case (78 C 751) is awaiting trial before the Honorable Judge George M. Leighton of the United States Court for the

Northern District of Illinois. On March 17, 1978, the United States filed suit against OMC also in the Northern District. That action is pending before the Honorable Frank McGarr (78 C 1004). On August 10, 1978, the Illinois Attorney General filed its own complaint against OMC.[1]

The Petitioner, OMC, is a Delaware corporation with its executive headquarters in Waukegan, Illinois. (R2, Item 1, par. 5)[2]. It is alleged by both the United States and the Illinois Attorney General that during the years 1959 through 1972 OMC purchased a hydraulic fluid composed of polychlorinated biphenyls ("PCBs"), which fluids were used in an aluminum die cast facility. (R1, Item 1, para. 10; R2, Item 1, para 5). OMC's corporate offices are adjacent to this former facility. It is further alleged that OMC discharged PCBs into a ditch on OMC's property (alleged to be a navigable waterway), into Waukegan Harbor and Lake Michigan. (R1, Item 1, para. 414; R2, Item 1, para. 7). Although there have never been effluent standards governing the discharge of PCBs from an aluminum die casting facility, both the Illinois Attorney General and the United States brought suit against OMC in federal district court seeking

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[1] In addition, an administrative proceeding before the Illinois Pollution Control Board involves a potential determination as to whether OMC must take additional steps to control its discharges. (*OMC* v. *IEPA*, PCB 79-141). That proceeding is also continuing.

[2] These statements are taken from the complaints filed by the United States and the Illinois Attorney General, and from the records filed in the two appeals to the Seventh Circuit (Nos. 79-134 and 79-1725). As used herein, "R1", refers to the record in the first case [the Attorney General's independent claim] and "R2" to record items (from the 79-1725 case) [denial of intervention]

to require OMC to study techniques of removal and undertake the removal of sediments allegedly contaminated with PCBs. (R1, Item 1, pp. 13-14; R2 Item 1, pp. 6-7). These suits claim that OMC was prohibited from ever discharging PCBs. (R1, Item 1, para. 23, R2, Item 1, para. 12, 18)

The opinion of the Court of Appeals below decided two consolidated appeals by the Illinois Attorney General. The first appeal arose from the dismissal of the Attorney General's independent complaint. Two federal causes of action were claimed: one for violation of the Clean Water Act and the second under the federal common law of nuisance. The claims, however, alleged that the discharge had resulted in damage to Illinois' aquatic life, bird life and water quality, as well as harm to the health and welfare of the citizens of Illinois. No other state has sought to sue OMC for any injury to its interests. The dispute is between an elected official of the State of Illinois and an Illinois industry for allegedly injuring interests of Illinois citizens.

The district court dismissed the Attorney General's complaint; finding first, that he had not given the 60 day notice required by the Clean Water Act. 33 U.S.C. §1365(b)(1)(A). That finding was not appealed by the Attorney General. The district court also found that the complaint failed to state a cause of action for federal common law nuisance, because the allegations involved an intra-state controversy between the Illinois residents alleging injury in Illinois, rather than an injury which effected interests of more than one state. (App. D-4). Because there were no proper federal claims the district court dismissed the allegedly pendent state claims. (App. D-4)

After dismissal of the complaint, the Attorney General moved to intervene in the lawsuit which had been filed by the United States against the petitioner. That proposed complaint in intervention alleged the same facts as had the Attorney General's first, independent complaint. (R2, Item 60) It also requested that petitioner be required to undertake a study of techniques of removal and removal of allegedly contaminated sediments underlying navigable waters. *Id.* The district court denied the State's petition to intervene holding that the United States' suit was not an action "to require compliance" with a "standard, limitation or order," and hence the state did not have the right to intervene under Section 505(b)(1)(B) of the Act. (App. C-4) It also found that the interests of the Illinois Attorney General were adequately represented by the United States and also refused to grant permissive intervention. (App. C-5)

In its opinion below, the Court of Appeals reversed the district court in both appeals. It held first that the State's complaint, by merely alleging pollution of navigable waters, was sufficient to state a cause of action under federal common law of nuisance. Moreover, the court held that the federal common law of nuisance "fills the interstices of the [Federal Water Pollution Control] Act" (App. A-7), and stated that the amendments to the Act and regulations issued thereunder do not preempt the federal common law of nuisance. (citing its prior decision in *Illinois* v. *Milwaukee,* 599 F.2d 151, 162-63 (7th Cir. 1979), *cert. granted,* 48 U.S.L.W. 3594 (March 18, 1980), (App. A-7)

In the second appeal, the Court of Appeals held that the state Attorney General was entitled to intervene in the United States' case as a matter of right. Although

the court recognized that the United States was concerned with past pollution, rather than present discharges, the court held, as a matter of policy, that "parties that are affected . . . *should* have a right to intervene. . . ." (App. A-19) (emphasis supplied).

REASONS FOR GRANTING THE WRIT

This case raises issues involving an extraordinarily important and timely question—can the lower federal courts create substantive environmental standards and allow citizens to bypass remedies provided by federal statutes? These issues go to the heart of our system of federal government and the relationship between Congress and the lower federal courts.

The first issue is whether, in view of the comprehensive 1972 and 1977 amendments to the FWPCA and regulations promulgated thereunder, the federal common law nuisance doctrine has been displaced. The second issue considers whether, if nuisance has not been preempted, it applies where there is no dispute between two or more states. The opinion of the Seventh Circuit holding that no interstate effect is necessary is in an acknowledged, direct conflict with decisions of other circuits. The final issues require this Court's review of the scope of the right of intervention by citizens in enforcement actions under the Clean Water Act.

The proper role of the lower federal courts is central to each of these issues and this petition for certiorari. May a federal court depart from Congressional statutes and constitutional authority to reach a "result" which, it believes, "should" be the law, or a result based only on policy? We think not. The function of the federal

courts ought to be to enforce Congress' detailed statutory schemes, such as the Clean Water Act, and to refrain from creation of judge-made substantive standards of conduct. This Court should grant this writ to review the Court of Appeals, and reverse the judgment below and affirm the district court on these issues.

I. THE FEDERAL COMMON LAW OF NUISANCE HAS BEEN DISPLACED BY ENACTMENT OF THE CLEAN WATER ACT.

In April, 1972, this Court announced that a federal common law of nuisance claim could be brought under 28 U.S.C. §1331 for the Illinois Attorney General against the City of Milwaukee, Wisconsin and associated sewage commissions for discharges from the Milwaukee sewers and treatment facilities into Lake Michigan which allegedly injured Illinois' interests. *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). Prior to that decision, only one federal case had recognized a federal common law nuisance claim. *Texas* v. *Pankey,* 441 F.2d 236 (10th Cir. 1971). Like *Illinois* v. *Milwaukee, Texas* v. *Pankey* involved a claim by one state against pollution originating outside its territory. But since April, 1972, Congress has enacted comprehensive amendments to the Federal Water Pollution Control Act and made "mid-course corrections" to those Amendments by the Clean Water Act of 1977. Despite these extensive amendments, the lower federal courts have continued to accept claims based on the federal common law of nuisance. The Seventh Circuit has now "interpreted" *Illinois* v. *Milwaukee* to allow for a federal claim, regardless of the parties, for any alleged "nuisances" of any waterway subject to federal constitutional authority. (App. A-7)

A. The Clean Water Act Represents A Comprehensive Approach To Restore And Maintain The Quality Of The Waters Of The United States.

General Requirements

Six months after this court's decision in *Illinois* v. *Milwaukee,* Congress abolished the prior Federal Water Pollution Control Act and enacted the Federal Water Pollution Control Act Amendments of 1972. Now known as the Clean Water Act, the statute's objective is "to restore and maintain the chemical, physical and biological integrity of the Nation's waters. . . ." 33 U.S.C. §1251(a). To accomplish this goal, Congress addressed every substantive issue known to be relevant and created a detailed, direct and logical progression for the nation's efforts to improve the quality of interstate and navigable waters.

The Act provides for the adoption of water quality standards by states, and their review by U.S. EPA. 33 U.S.C. §1313(a). The states were directed to periodically review these standards. *Id.* §1313(c) (1). If the state wishes to change a water quality standard, these revisions must be submitted to U.S.EPA. These revised standards must "be such as to protect the public health or welfare, enhance the quality of water and serve the purpose of this chapter." *Id.* §1313(c) (2). If the standards are inadequate, U.S.EPA is directed to adopt proper standards.

Technology Based Effluent Limitations

A very important feature of the Act is the creation of broad-ranging requirements to be applied at the point of discharge. The first step in this process is the promulgation of effluent limitations. U.S.EPA was directed to adopt regulations, on a category by category basis of wastewater treatment comparable to "best practicable

treatment technology currently available." ("BPT"). *See DuPont* v. *Train*, 430 U.S. 112 (1977). These BPT requirements for all sources were to be achieved by July 1, 1977. 33 U.S.C. §1311(b) (1). Effluent limitations reflecting the "best available treatment technology economically achievable" ("BAT") were originally required to be achieved by July 1, 1983; that step has now been divided into separate BAT requirements and timetables for toxic pollutants and non-toxic, conventional pollutants and a new standard of treatment for "conventional" pollutants from certain sources. 33 U.S.C. §1311(b) (2). Toxic pollutant effluent limitations (and standards where the limitations are insufficient) are mandated under section 307(a). Standards for new sources and for plants which discharge to publicly-owned treatment works are also required. 33 U.S.C. §§1316; 1317(b) (c).

These technology-based effluent limitations must be based upon the technical feasibility and economic reasonableness of applying water pollution control technology and manufacturing techniques to various types of sources. U.S.EPA develops these requirements pursuant to rulemaking and makes extensive use of outside consultants to identify the best techniques available. The affected sources have the opportunity to point out the limits of the recommended techniques and the efforts of the regulations. And pursuant to executive order of the President, U.S.EPA makes determination as to the economic impact and other implications of the proposed regulations.

Source-Specific Requirements and Enforcement

Another major feature of the Act is the National Pollutant Discharge Elimination System ("NPDES") permit program. This system provides a mechanism to transform federal and state requirements for water pollution

control into individualized requirements for each point source. *EPA* v. *California,* 426 U.S. 200, 205 (1976). No point source is exempt from this permit requirement. *National Resources Defense Council* v. *Costle,* 568 F.2d 1369 (D.C. Cir. 1978). The Act also provides for permitting of dredge and fill activities in protected wetlands. 33 U.S.C. §1344.

The Act provides for broad citizens' participation in the setting of these administrative standards, permit conditions and other requirements. 33 U.S.C. §1251(e). U.S.-EPA has historically permitted broad citizen input into its rule-making and permitting procedures. By statute, NPDES permits can be issued by U.S.EPA or by a state, only after a reasonable "opportunity for public hearing." 33 U.S.C. §1342(a) (1),(b) (3); *Costle* v. *Pacific Legal Foundation,* ..... U.S. ....., 100 S. Ct. 1095 (1980). Citizens who have participated in these proceedings may appeal the final administrative decision. *E.g., Porter County Chapter, Izaak Walton League* v. *Costle,* 571 F.2d 359 (7th Cir. 1978).

Although the Act provides for broad citizen participation it clearly and unequivocally limits the citizen (and industrial) advocates to their adminstrative remedies. A decision by U.S.EPA to issue or deny an NPDES permit is reviewable under Section 509(b) (1). 33 U.S.C. §1369(b) (1). Because it is immediately reviewable, any issues which could have been raised in such an appeal may not be litigated in an enforcement proceeding. *Id.* §1369(b) (2). Section 402(k) further provides that, with but one exception, compliance with the terms of a permit shall be deemed compliance, in an enforcement proceeding brought by U.S.EPA or by a citizen, with the operative discharge related requirements of the Act. 33

U.S.C. §1342(k). Indeed, the legislative history of Section 505 discloses that Congress did not intend to allow citizens to sue in federal court to secure "common law definitions of acceptable water quality," which was to take place in the administrative process. S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971); 2 Legis. Hist. at 1497.[3] The intended purpose of the NPDES permit then is to provide a measure of protection for the discharger. *DuPont* v. *Train, supra,* 430 U.S. at 138 n. 28, and to provide for certainty and finality for each discharger's obligations under the Act. *See, EPA* v. *California, supra,* 426 U.S. at 205. This finality also facilitates enforcement.

A final permit may be enforced by U.S.EPA and by citizens directly. A "citizen" under §505 includes a state official such as the Illinois Attorney General. *See,* 33 U.S.C. §1365(g), (h). Thus, Congress has addressed the very deficiency in the previous Federal Water Pollution Control Act which this Court cited in *Illinois* v. *Milwaukee,* 406 U.S. at 103.

Other Issues Addressed By Congress

In addition to the detailed program to control point sources, Congress addressed several other issues concerning protection of water resources.

An entire title of the Act is devoted to the procedure for making available federal assistance for the construction or upgrading of publicly-owned treatment works. 33 U.S.C. §§1281-1289. Section 311 is a self-contained and exhaustive statute specifying the duties and responsibilities (and limits upon those liabilities) for spills of oil and hazardous substances as identified by U.S.EPA. 33

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[3] All citations to "Legis. Hist." refer to "A History of the Federal Water Pollution Control Act Amendments of 1972" (Committee Print, 1973).

U.S.C. §1321. Congress has mandated the state undertake a planning process to control point sources and non-point sources of pollution, and has authorized funds for these efforts. 33 U.S.C. §1288(b), 1313(e). A program for the restoration of publicly-owned, fresh water lakes was also created and recently expanded. 33 U.S.C. §1324.

Other provisions of the Clean Water Act address the transition from the prior statute and Refuse Act, to the present comprehensive program. The 1972 Amendments essentially terminated the Refuse Act as a basis for federal control of discharges.[4] *EPA* v. *California,* 426 U.S. at 204. Permits issued under the Refuse act were deemed permits issued under the 1972 Amendments. 33 U.S.C. §1342(a) (4). Any person who had applied for a Refuse Act permit and whose application for a permit was still pending when the 1972 Amendments were adopted, was protected from suit for not having a permit until December 31, 1974 or until the permit was issued or the request denied. 33 U.S.C. §1342(k).

The statute also addresses pollutants that had already been discharged and other non-point sources. Congress directed that U.S.EPA identify the location of in-place pollutants with particular emphasis on toxic pollutants in critical harbors and to proceed to remove these substances through the Corps of Engineers. 33 U.S.C. §1265. This provision was apparently intended for harbors on the Great Lakes, and to offset the extra costs of dredg-

[4] Of course, the Corps of Engineers did not interpret the Refuse Act so as to require a pollution control program; only in 1971 did the Corps adopt implementing regulations. *See also, Pennsylvania Industrial Chemical Company* (*PICCO*) v. *United States,* 411 U.S. 655, (1973). And within a year, a district court enjoined issuance of these permits. *Kalur* v. *Resor,* 355 F. Supp. 1 (D.D.C. 1971).

ing these materials. 1 Legis. History at 167. EPA was also directed to undertake a clean-up program in Lake Erie, and to enter into contracts for the demonstration of practical methods for removal of pollutants from the Great Lakes. 33 U.S.C. §1258(c), (a).

The Present Decision

The Seventh Circuit has again refused to accept the Clean Water Act as displacing the federal common law of nuisance. (App. A-7, see App. D-3) OMC applied for a Refuse Act permit and was ultimately issued an NPDES permit. The Illinois Attorney General complained that OMC has violated the permit, but he did not appeal the district court's dismissal of that count of his complaint. He has never alleged that the federal statute is inadequate, yet he has succeeded in getting into federal court by abandoning that claim. Petitioner believes that its federal obligations ought to be measured under the Clean Water Act, and its NPDES permit. OMC is entitled to the certainty and finality Congress intended to accord to NPDES permits. The is no basis for the federal courts to override the comprehensive legislative and administrative standards included in and promulgated under the Clean Water Act, and OMC's NPDES permit.

B. The Doctrine Of Separation Of Powers Prohibits The Federal Common Law Of Nuisance Being Applied To Dispute Involving Alleged Pollution Of Interstate Or Navigable Waters.

The constitutional doctrine of separation of powers allocates essential authority among the governmental departments. The effect of the doctrine is to require that each branch respect the distinctive powers of the others. *TVA* v. *Hill*, ... U.S. ....., 98 S. Ct. 2279, 2301 (1978). To meet this requirement, Congress must defer to the judicial

functions of interpretation and review, and the courts must defer to the Congressional function of legislation. This Court has consistently declined to substitute its judgment for that of the Congress, and has refrained from encroaching upon legislative authority where Congress has expressly addressed matters of public policy.

A recent decision of this Court, *TVA* v. *Hill*, ... U.S. ....., 98 S. Ct. 2279 (1978) exemplifies that approach. There the Court refused to impose a judicial remedy, finding that Congress had specifically ordered its priorities in the Endangered Species Act. Basing its deference to the Congressional policy upon the doctrine of separation of powers, the Court stated:

> Once the meaning of an enactment is discerned and its constitutionality determined, the judicial process comes to an end. . . . [I]n our constitutional system the commitment to the separation of powers is too fundamental for us to pre-empt Congressional action by judicially decreeing what accords with "common sense and the public weal." Our Constitution vests such responsibilities in the political Branches.

Id. at 2302. To preserve the structural integrity of the constitutional design, this Court ruled that the judiciary must avoid intruding upon the policy-making activities of the Congress. *Id.*

Where Congress has enacted an applicable statute, the courts may not invoke a parallel judicial remedy. The Court's respect for that principle is illustrated by its decision in *Arizona* v. *California*, 373 U.S. 546 (1963), where the Court was presented with the struggle of the southwestern states to allocate the waters of the Colorado River. Interstate distribution of water had been governed by two common law doctrines, prior appropriation and equitable apportionment. Recognizing the continuing controversy, Congress enacted the Boulder Canyon Proj-

ect Act in 1928 to provide a method of allocating water among the states. However, the displacement of the judicial apportionment doctrines was not acknowledged until 1963, when this Court found that Congress had created a comprehensive water distribution plan in the Boulder Canyon Project Act. *Id.* at 565.

> Where Congress has so exercised its Constitutional power over waters courts have no power to substitute their own notions of "equitable apportionment" for the apportionment chosen by Congress.

Id.

Moreover, even where a judicial doctrine has been formulated for the precise issue presented, this Court has deferred to a Congressional scheme in keeping with the separation of powers doctrine. This Court again refused to substitute its judgment for that of Congress in *Mobil Oil Company* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978). The general maritime law provided no survivor's remedy, the Court had ruled in *The Harrisburg,* 119 U.S. 199 (1886), barring recovery for maritime fatalities unless they occurred in waters within the jurisdiction of the state courts and their wrongful death statutes. In 1920 Congress responded to this apparently capricious denial of survivors' benefits by enacting the Death on the High Seas Act. In 1970, however, the Court repudiated *The Harrisburg* and held that the general maritime law provided a wrongful death remedy when the fatality occurred within state waters. *Moragne* v. *States Marine Lines, Inc.,* 368 U.S. 375 (1970). The Court further expanded that ruling in *Sea-Land Services, Inc.* v. *Gaudet,* 414 U.S. 573 (1974), where the location of the fatality was not considered a significant factor. With these two decisions, the Court had created a means of avoiding entirely the Death on the High Seas Act. This Court rectified this confusion in *Mobil Oil Corp.*

v. *Higginbotham*, ... U.S. ....., 98 S.Ct. 2010 (1978), where it deferred to the Death on the High Seas Act and held it constituted the Congressional expression of a wrongful death policy. *Id.* at 2015. With that decision, this Court ruled that a judicial remedy may not be invoked to override a statutory scheme created by Congress.

The present case involves a situation within the scope of the Clean Water Act. Congress has there declared the federal policy and has outlined its mandate to all concerned. The courts have no authority to create additional substantive law.

C. The Federal Common Law Of Nuisance Jeopardizes The Integrity Of The Statutory Scheme.

If a citizen, a state, or even the federal government is now permitted to claim a "nuisance" under the federal common law, the significance of the Congressional program will be substantially eliminated. Citizens will not be required to give prior notice of their suits against dischargers and would be able to secure a judge-made water quality standard. States and citizens will not be forced to first participate in administrative proceedings before going to court. Dischargers will have little incentive in participating in the administrative program. Even federal officials might use the theory to bypass the limitations stated in their enabling authority and the protection given dischargers by sections 402(k) and 509(b)(2).

This will increase the costs of doing business and provide greater incentive towards litigation. Rather than concentrating on achieving compliance with a known effluent requirement, companies and municipalities will be forced to retain legions of lawyers and consultants to defend their operations. Even if the company or city

prevails, the high costs of litigating in court each and every "nuisance", will be paid by someone. These costs must be borne either by the purchasers of the company's product (or the city's sewer services), the taxpayers, the investor who owns or has lent capital to the company or city, the employees or the persons who do business with the discharger, or any combination of these persons. Petitioner does not challenge the clear utility of environmental protection and control. However, OMC submits that there is no basis for the federal courts being a repository of power to duplicate and override the administrative programs created by the Clean Water Act, except when the court is called upon, under the provisions of the Act, to enforce Congressional intent and restrain improper agency action or inaction.

D. Summary - This Court Should Hold That The Clean Water Act Has Displaced The Federal Common Law Of Nuisance.

Congress has declared the federal policy for the protection of navigable waters through the Clean Water Act. The Act has been amended twice in the past decade to incorporate comprehensive detailed and specific approaches to environmental control for discharges from all potential sources of water pollution, including point and non-point sources. To interpose the federal common law of nuisance where the provisions of the Clean Water Act specifically apply to the controversy presented would allow the federal judiciary to override the policy determinations of the Congress. That ruling would directly contravene this Court's contemporary interpretation of the doctrine of separation of powers. *Mobil Oil Corp.* v. *Higginbotham,* ..... U.S. ....., 98 S.Ct. 2010 (1978); *Arizona* v. *California,* 373 U.S. 546 (1963). Nullification of the NPDES program and a dramatic expansion of

the role of the federal courts would result. Since the federal courts would have voided the certainty and finality accorded to discharges in the Clean Water Act, they would be presented with the myriad issues of discharge control which the Act had allocated to administrative determination. To allow the lower federal courts to apply the federal common law of nuisance is unwise as a matter of judicial policy and constitutes an unconstitutional usurpation of Congressional authority.

II. IF THE FEDERAL COMMON LAW OF NUISANCE HAS NOT BEEN DISPLACED BY THE CLEAN WATER ACT, THEN IT CAN EXIST ONLY TO PROVIDE AN IMPARTIAL FORUM AND RULE OF DECISION FOR CASES INVOLVING AN INTER-STATE DISPUTE.

While we believe this court should hold that the federal common law of nuisance has been displaced, even if it remains viable for some situations, it cannot properly be applied to local disputes.

A. The Decision Below Created A Conflict Among The Circuits. The Circuits Continue To Be Confused In Their Understanding Of The Federal Common Law Of Nuisance.

The Seventh Circuit deliberately created a conflict in its opinion below and refused to follow the decisions of the Fourth and Eighth Circuits.

> With due deference to the courts deciding those cases, we disagree with the rationale they adopted. As we read *Illinois* v. *Milwaukee,* the Supreme Court explicitly recognized a federal common law action to abate pollution in "inter-state or navigable water.

(App. A-13)

The district court had followed those other circuits in holding that the complaint filed by the Illinois Attorney

General against OMC for pollution allegedly originating at its Waukegan, Illinois plants, did not state a cause of action under the federal common law of nuisance. (App. A-13) In reversing the trial judge, the Court of Appeals created a conflict among the circuits and unnecessarily broadened the scope of 28 U.S.C. §1331 to include nuisance claims which presented no inter-state issues.

In *Reserve Mining Co.* v. *EPA,* 514 F.2d 492 (8th Cir. 1975), the Court of Appeals for the Eighth Circuit rejected the federal common law of nuisance as a basis for relief, citing *Illinois* v. *Milwaukee* and *Texas* v. *Pankey.* The Court held that the complaint of the United States alleging that the defendant's discharge significantly endangered the health of persons in the vicinity of the defendant's operations, did not allege inter-state effects and did not have a claim for relief under federal common law of nuisance. In *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1008 (4th Cir. 1976), that court construed *Illinois* v. *Milwaukee* to stand for the proposition that federal common law of nuisance permits the abatement "of a public nuisance in one state which infringes upon the environmental and ecological rights of another state. . . ." The Court refused to apply the federal common law to what it found to be an intra-state matter. The controversy there was found to be entirely local in nature; the parties were local, there were no allegations of any effect outside the State of Maryland, no other state was complaining of the nuisance and the law of Maryland was adequate for the resolution of the dispute.

The Seventh Circuit refused to follow these decisions, stating:

> There is no basis for putting a gloss on the Supreme Court holding that would restrict its application to situations in which one state complains of damages to its environment or ecology by a pollution source in another state.

(App. A.13)

Had the Seventh Circuit followed these decisions, it would have upheld the district court. Like the plaintiffs in *Reserve Mining* and *Jones Falls,* the alleged pollution here involves a dispute between an Illinois official and an Illinois based company concerning alleged operations at an Illinois facility which allegedly injured Illinois interests.

This Court should intercede to resolve this new conflict. Decisions from other circuits indicate they, too, are in need of guidance as to the proper scope of the federal common law of nuisance. The First Circuit has remarked in dicta that "Whether the common law so recognized [in *Illinois* v. *Milwaukee*] extends to suits involving pollution originating within the territorial jurisdiction of the plaintiff is doubtful." *Massachusetts* v. *United States Veterans Administration,* 514 F.2d 119, 123 (1st Cir. 1976). The Third Circuit recently stated, "Relegating these [private] litigants to *possibly* conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to *federalize* those standards and would undermine federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters." *National Sea Clammers Association* v. *City of New York,* 616 F.2d 1222, 1233 (1980) (emphasis supplied). The Second Circuit has summarily affirmed a district court decision holding that the federal common law of nuisance should be limited to cases with

multi-state impact or effect. *East End Yacht Club, Inc.* v. *Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977), *aff'g Parsell* v. *Shell Oil Co.*, 421 F.Supp. 1275 (D. Conn. 1976). That court is now awaiting this court's decision in *Milwaukee* v. *Illinois*, 79-408, before deciding whether a federal common law of nuisance claim may be maintained by residents against a New York utility which had complied with standards approved by the U.S.EPA. *New England Legal Foundation* v. *Costle*, No. 79-6202 (2d Cir. May 20, 1980). This Court should also clarify the permissible scope of the federal common law of nuisance (if it should exist at all) to resolve the dispute among the circuits and provide definitive guidance to the lower federal courts.

B. Federal Common Law Of Nuisance Can Apply Only To Inter-State Disputes.

In addition to creating this conflict, the Seventh Circuit under the federal common law of nuisance has now created an independent basis for substantive, judge-made standards for environmental protection. According to the Seventh Circuit state standards are "highly relevant." (Slip opinion at 10 n. 16; App. A-12). And it is clear that the federal common law of nuisance preempts state law. As this Court stated in *Illinois* v. *Milwaukee*:

> While federal law governs, consideration of state standards may be relevant. Thus a State with high water quality standards may well ask that its strict standards be honored and that it not be compelled to lower itself to the more degrading standards of a neighbor.

406 U.S. at 107 (citations and footnote omitted).

But in the present case, the only "relevant" standards are those promulgated by the State of Illinois. Should the federal court enforce a different standard, either more or less stringent? For the federal court to adopt and enforce a different standard would create an independent judicial override on state standards. Such a "brooding omnipresence" in the federal judiciary has long been discredited. *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945). If the common law standard were more stringent than Illinois, it would constitute judicial legislation of state interests. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). But if the federal standard would not be more stringent, then nuisance could not be a substantive federal question and be no basis for federal jurisdiction. *Gully* v. *First National Bank,* 299 U.S. 109 (1936).

The federal common law of nuisance should exist, if at all, only to provide an impartial forum and rule of decision for inter-state disputes. Each of the cases cited by this Court in *Illinois* v. *Milwaukee* involved disputes based upon conflicting interests of two or more states. The federal courts interceded to resolve a classic federalism controversy. The named parties need not be sovereign states; but the parties' adverse interests must be based upon the laws and interests of more than one state. *See, Illinois* v. *Milwaukee,* 406 U.S. at 105 n. 6.

It is not enough that the waters be interstate. Leases to federal lands and a federal interest in safe aircraft travel do not create a basis for a federal common law, absent a "showing that state law is not adequate. . . ." *Wallis* v. *Pan-American Petroleum Corp.,* 384 U.S. 63, 71 (1966); *Miree* v. *DeKalb County,* 433 U.S. 25, 32

(1977). The decision to displace state law should be left to Congress, at least where there is no showing of an actual conflict between the laws of two or more states, or between the laws of a state and a federal policy. *Miree* v. *DeKalb County, supra*; *see Illinois* v. *Milwaukee*, 406 U.S. at 107 n.9.

The purpose then of the federal common law of nuisance, if it is to have any purpose at all, is to provide a rule of decision in a federal forum. Because all the significant contacts pleaded in this case involve Illinois law, there is no "inter-state effect" and no permissible basis for invoking federal jurisdiction under the federal common law of nuisance and 28 U.S.C. §1331.

C. The Opinion Below Unnecessarily And Improperly Broadens The Jurisdiction Of Federal Courts Over Nuisance Claims.

The opinion states that any "pollution" of water within the commerce power of Congress gives rise to a federal common law of nuisance claim. Neighbor may now sue neighbor in federal court simply by claiming a "nuisance". The state courts and administrative bodies can be bypassed simply by claiming sufficient damage. Because birds fly (just as "Fish swim" [App. A-17]) and this Court's decision in *Illinois* v. *Milwaukee* spoke in terms of *air and water*, even localized air "pollution" nuisance claims would be federal questions under the Seventh Circuit's decision below. An untended backyard grill, if it allegedly caused sufficient injury to a neighbor's property, could be the basis for suit in federal court under nuisance. Unless reversed, the precedent established by the decision below would turn federal courts into a par-

allel forum for adjudication of cases heretofore decided only by state courts.

The Seventh Circuit's ruling is an unwarranted intrusion of the federal courts into matters which are purely local in nature, where state forums are available to settle the disputes and where state law could be applied. Moreover, the involvement of federal courts in all disputes involving navigable or inter-state waters will circumvent the intent of Congress that states should play an important role in pollution control. 33 U.S.C. §1251(b). The application of a federal common law would preempt the state's own pollution control laws concerning alleged pollution of waters and alleged harm within the state. *Illinois* v. *Milwaukee,* 406 U.S. at 103 n.5. But Congress intended to preserve state authority. 33 U.S.C. §1370.

The decision below would also permit citizens to bypass the restraints of Section 505(b) of the Clean Water Act. 33 U.S.C. §1365(b). This will undermine the incentive for citizens to use their extensive administrative opportunities *before* going to court. It will conflict with Congress' intent that citizens not resort to the courts for creation of common law water quality standards. 2 Legis. History at 1497.

The holding of the court below that all air and navigable water pollution cases involve a federal question is clearly erroneous and goes far beyond this Court's decision in *Illinois* v. *Milwaukee.* This matter of extreme and timely importance should be resolved by this Court in reversing the decision of the Court of Appeals.

III. THERE IS NO STATUTORY RIGHT OF INTERVENTION TO THE PENDING SUIT BECAUSE THAT ACTION IS NOT ONE SEEKING TO REQUIRE COMPLIANCE WITH A "STANDARD, LIMITATION OR ORDER".

This Court should also review the Court of Appeals' careless application of the statute to the case before it and the unlimited intervention allowed by the Court's gloss upon section 505(b)(1)(B). Further, the Court of Appeals decided this question based upon a legislative-type judgment which ignores the careful language of the section. Moreover, the court effectively entered an advisory opinion.

After his complaint against OMC was dismissed and he had filed a notice of appeal in the Court of Appeals, the Attorney General then filed a Motion for Leave to Intervene in the case brought by the U.S.EPA. This U.S.EPA case was filed in March, 1978 (five months *before* the Attorney General's claim was filed) and had then been pending before Judge McGarr for a year. The district judge had had the opportunity to meet with counsel for the United States and OMC and rule on various interlocutory and discovery matters. He had been apprised of the nature of that case by the parties. After considering briefs by the parties, Judge McGarr denied the Motion to Intervene. The Attorney General appealed.

The Attorney General's independent complaint, which included an allegation that OMC had violated its NPDES permit, was dismissed in part, for failure to give the requisite 60 days notice under Section 505(b)-(1)(A). The Attorney General did not appeal that ruling. (App. A) Yet the Court of Appeals apparently believed that, notwithstanding this tactical decision, it should get

the Attorney General into the pending litigation, regardless of the limitations stated in the Clean Water Act. The Court of Appeals committed serious error in allowing the Illinois Attorney General to bypass the remedy created by Congress.

The right to intervene depends upon (1) the federal government having brought suit (2) "to require compliance with the standard, limitation or order" which the citizen has alleged is being violated by the discharger. A "standard, limitation or order" is specifically defined for purposes of Section 505 as pertaining to *discharges* of pollutants from point sources. 33 U.S.C. §1365(f). The typical example of a discharge from a point source is an outfall from a manufacturing facility. *DuPont* v. *Train,* 430 U.S. 112, 114-15 (1977).

The relief specifically requested by the federal government does not include a request that OMC further control eixsting discharges; rather it seeks the removal of alleged in-place pollutants, (which allegedly had resulted from previous discharges by OMC) and the imposition of penalties. After having met on numerous occasions with counsel for U.S.EPA and OMC, Judge McGarr ruled that the remedy sought was not one seeking to require compliance with a discharge requirement. (App. C-4)

> ". . . The government obviously elected to seek relief only for past violations. . . .
> Had Congress intended to grant intervention as of right in all suits brought by the Administrator under the Act, it could have so worded §505(b)(1)(B)."

Id. The Court of Appeals "[a]dmitted [that] the federal government seeks only an injunction to require dredging. . . ." (App. A-19) But the Court of Appeals then stated:

> "The complaint, however, states that the injunctions sought are designed to prevent further contamination of the bodies of water, and it leaves open the door for the court to grant such other and further relief as it deems just and proper."

The court erroneously stated that OMC was discharging a dangerous amount of PCBs[5] and then opined ". . . parties that are affected by this pollution *should have a right to intervene to seek abatement* even if the federal government is principally concerned with past pollution." *Id.* (emphasis supplied). But Congress *did not* prohibit separate citizen's actions to require compliance. As pointed out by Judge McGarr, Congress could have written the Act to allow intervention in all cases (in which case it would likely have prohibited separate citizen actions). Courts, however, have no power to rewrite a statute so as to allow that which they believe "should" be the law. *E.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 (1977).

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[5] The complaints alleged that OMC is still discharging PCB's. The record shows, however, that OMC, IEPA and U.S.EPA agreed on a plan by which OMC would reduce its discharges and that OMC has implemented this plan. (R2, Item 10, Exhibits 6,7; R2, Item 16). In fact, OMC has no process water outfalls — its outfalls discharged only noncontact cooling water and stormwater runoff. (R2, Item 27, para. 6). The only "danger" even alleged by the government is that certain sediments may release PCBs and affect water quality. (R2, Item 1, pp. 6-7). The only "discharge" of PCBs apparently stems from OMC's intake water (which is used as non-contact cooling water) and the presence of PCBs in rainfall over Lake Michigan. *E.g.,* Murphy, T.J. and Rzeszutks, C.P., *Precipitation Inputs Of PCBs To Lake Michigan,* J. Great Lakes Res. (Dec. 1977).

Indeed, the legislative history of the Clean Water Act clearly shows that Congress did not intend for "citizens" to be participants, under Section 505, in cases such as the pending case filed by the United States. The pending case alleges an adverse affect upon water quality, but specifies no promulgated water quality standards which must be enforced. The prayer leaves it to the district court to decide ultimately what is an appropriate water quality standard: should the sediments be removed, and if so, how much and in what manner? But Congress made clear that Section 505 would not be the basis for citizen's resort to federal courts to establish acceptable water quality levels. According to the Senate committee which initially drafted the bill, "Section 505 will not substitute a 'common law' or court developed definition of water quality." 2 Legis. History at 1706. The Court of Appeals has done just what Congress feared — allowed the Attorney General or any other "citizen", to attempt to persuade Judge McGarr as to what the ultimate remedy should be.

The Court of Appeals erroneously relied on the standard, boilerplate prayer for relief ("Such other relief as the Court may deem just") as "leaving the door open" for Judge McGarr to order further abatement of OMC's alleged discharge. (App. A-19) If that remains the law, then citizens may intervene in any government case under the Clean Water Act. We believe the wiser course was that chosen by Judge McGarr — that this general prayer for relief was not sufficiently specific as to trigger a right to intervene under §505(b)(1)(B). (App. C-4) This court should accept this writ to uphold Judge McGarr's common sense interpretation of this general boilerplate phrase.

Intervention into the pending case should have been decided on the intervention rules established by this Court. F.R. Civ. P. 24(a)(2) and (b)(2). The indiscriminate holding of the Court of Appeals was not required by Congress and unnecessarily broadens citizens access to the federal courts; indeed, it would permit citizens to sue to create new water quality standards. The Court of Appeals issued what was essentially an advisory opinion — it allowed the Attorney General to bring a claim against OMC in federal court, even though he had abandoned the dismissal of his §505(a) claim on appeal. Congress has already specified the conditions under which an independent action could be brought by enacting Section 505(b)(1). The court below was powerless to expand the scope of the statute. *Cf. Costle* v. *Pacific Legal Foundation,* ..... U.S. ....., 100 S.Ct. 1095 (1980).

For these reasons, this Court should set aside the decision of the Seventh Circuit that there is a right for citizens to intervene in the pending federal case.

IV. THE COURT OF APPEALS COMMITTED SERIOUS ERROR ALLOWING THE INTERVENOR TO CHOOSE BETWEEN MAINTAINING A SEPARATE SUIT OR INTERVENING IN THE PENDING CASE BROUGHT BY THE UNITED STATES.

The Court of Appeals held that the Attorney General was entitled to intervene as of right pursuant to §505(b)(1)(B).[6] It also stated that the Attorney General had a choice of maintaining a separate common law of nuisance action, or intervening. (App. A-20). This in-

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[6] The Court of Appeals' concept of "pollution" is inconsistent with the detailed rules laid out in the Clean Water Act. *E.g., DuPont* v. *Train,* 430 U.S. 112 (1977).

credible disregard of the Congressional scheme must be reviewed by this Court to preserve respect for the limitation on citizen participation stated in the Act. *Cf. Costle* v. *Pacific Legal Foundation,* ..... U.S. ....., 100 S.Ct. 1095 (1980) (construing the limitations contained in section 402(a) of the Act, for requesting adjudicatory hearings on NPDES permits).

The statute prohibits the courts and citizens from electing to sue independently or intervening as of right under §505. Independent citizen suits are prohibited by Section 505(b)(1)(B) when federal or state government is already "diligently prosecuting an action to require compliance with the standard, limitation or order," cited by the citizen as being violated. 33 U.S.C. §1265(b)(1)(B); *E.g., Stream Pollution Control Board* v. *United States Steel Corp.,* 512 F.2d 1036 (7th Cir. 1975) (Stevens, J.). But citizens may intervene "in such actions," as a matter of right. Citizen intervention under the act thus exists only when a separate citizen action is prohibited.

Section 505(b)(1)(B) focuses on the remedy being sought by the state or federal government. Neither the intervenor nor the court have authority to elect to sue separately or intervene. Indeed, the statutory provision is consistent with the rule that an intervenor takes the case as he finds it. *Fuller* v. *Volk,* 351 F.2d 323, 328 (3rd Cir. 1965).

If Section 505(b)(1)(B) applies to the pending case, the court is powerless to allow a separate proceeding to continue. If there is no prohibition against a separate citizen suit, then there is no right to intervene. The judgment of the Court of Appeals allowing the Attorney

General his choice of action should be set aside. It is a gross departure from the statute which this Court should correct.

CONCLUSION

For the foregoing reasons, Petitioner submits that the Court should issue the Writ of Certiorari and review the instant decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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